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No. 844

In the Supreme Court of the United States

October Term, 1961

Louis E. Fox, Petitioner

v.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The *per curiam* opinion of the court of appeals (R. 359–360; Pet. App. 2–3) is reported at 296 F. 2d 217.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1961 (R. 361). A petition for rehearing was denied on February 8, 1962 (R. 366). On March 2, 1962, Mr. Justice Black extended the time within which to file a petition for a writ of certiorari to and including March 30, 1962. The

petition was filed on April 4, 1962.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly exercised its discretion in refusing to permit defense counsel to participate in the interrogation of prospective jurors.

2. Whether the trial court's instructions and subsequent statements to the jury were proper.

RULE INVOLVED

Rule 24a of the Federal Rules of Criminal Procedure provides:

> (a) *Examination.*
>
> The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on each count of a four-count indictment charging that he embezzled funds belonging to the Bankers Savings and Loan Association of

[1] As we discuss *infra*, p. 9, the petition was filed out of time.

Galveston, Texas, a federally insured savings institution (R. 6–12, 325, 345). Petitioner was sentenced to imprisonment for a term of thirteen months on each count, the sentences to run concurrently. He was also fined a total of $8,000 (R. 343, 346–347). The court of appeals unanimously affirmed his conviction (R. 359–360; 256 F. 2d 217; Pet. App. 2–3).

A. THE FACTS OF THE CRIME

1. Petitioner was president of the Bankers Savings and Loan Association (hereinafter referred to as Bankers) from 1946 until April 1960 (R. 71, 222, 254), and was in direct charge of the bank's loan department. He decided whether or not the bank should purchase promissory notes, inspected the property which was to be the security for the notes and issued the checks when such notes were purchased (R. 146–147, 157, 235–236, 257). On various dates in 1958 and 1959, the four obligations which are the subject matter of the present indictment (R. 6–12)—the Sowell (count 1), Dooley (count 2), Velasquez (count 3), and Sims (count 4) notes—were purchased by Bankers from Ralph Burns, a building contractor (R. 176–177, 183–184, 188–195). These notes represented amounts owing to Burns for home construction and improvement (R. 61–62, 172). The pattern of the embezzlement was the same as to each of the notes, and may be fairly illustrated by the "Sowell" transaction.

Bankers purchased the Sowell promissory note, amounting to $5,000, from Burns on December 8, 1959 (R. 61, 176). On December 9, 1958, a $4,500

check was issued by Bankers as the purchase price for the note to the Commercial Title Company which had acted as escrow agent in the disbursement of the funds and issued the title insurance on the loan.[2] Papers accompanying this check stated that $500 had been deducted for "the agreed ten per cent discount" (R. 166; see also R. 63–64). Mr. Ralph Burns testified that he received $4,500 as payment for the sale of the Sowell note to Bankers and did not expect any further payment therefor (R. 176–177).

On the same date that the $4,500 check was issued to Burns, Bankers issued another check payable to the American Title Guaranty Company in the amount of $500 which was charged to the Sowell account on the Bankers' records (R. 59–60). The American Title Guaranty Company had not handled the title insurance on this note nor was it involved in any way at all with the loan (R. 62–63, 76–77, 254–255). The evidence showed, and petitioner admitted, that petitioner had caused this check to be so drawn and that he had thereafter stamped the endorsement of American Title Guaranty Company on the reverse side, cashed the check and used the proceeds for his own private purpose (see R. 145–147, 209–211, 225–226, 228, 234, 238–239, 255–259, 261), *i.e.*, the purchase of a family automobile (R. 125–130, 132–138, 143, 245).

The evidence further revealed that in September and October 1959, when these transactions came to the attention of an examiner for the Texas Department of

[2] Commercial Title Company also handled arrangements on the other three loans (R. 163–173).

Banking, petitioner was asked whether the amounts of the checks made payable to American Title Guaranty Company had been paid to Mr. Burns. Petitioner said that the money had been paid to Burns and that he would provide the receipts evidencing the payments (R. 92–98, 115). Thereafter, petitioner delivered to Mr. Burns the amount of discounts on each note and, in exchange, obtained from him back-dated receipts and related correspondence purporting to show that Burns had received the monies prior to the State investigation (See R. 175–190). Petitioner sent these back-dated receipts to the Department of Banking of the State of Texas (R. 118–127).

2. Petitioner testified in his own behalf (R. 221–293), and admitted that he had issued the checks, endorsed them and cashed them for his own use (R. 238–239, 255–256). His defense was that he had believed at that time that he was entitled to the monies because of the services he had rendered in purchasing the notes. As he explained it, since Bankers had a long-standing policy against purchasing notes at a discount (R. 239, 263–264), "there wasn't any reason why, since the discounts were available that [they] should be paid to the builder who was willing to give them up" (R. 256, 257–258, 265, 270–273). Petitioner stated that he did not inform the Board of Directors at Bankers that he was taking a service charge on the purchase of the

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When asked why he had ultimately returned these funds to Mr. Burns, petitioner testified that although he had originally thought that he was entitled to the discounts he subsequently "had learned otherwise" (R. 271).

notes (R. 258, 262), and that he had not made the checks directly payable to himself because he did not want the employees at Bankers or other banks in Galveston to know his personal business (R. 259–260).

B. THE JUDGE'S INSTRUCTIONS AND SUBSEQUENT STATEMENTS TO THE JURY

1. At the outset of his instructions, the trial judge advised the jury that although he intended to discuss the evidence, he had no personal opinion as to where the "truth of the matter lies," nor did he desire to express "any personal views about the matter" (R. 301). His sole aim, he stated, was to assist the jury in its consideration of the case; they were "entirely warranted and justified in disregarding anything [he said] * * * about the evidence" (R. 302; see also R. 311). After observing that the weight of the evidence and the credibility of the witnesses were issues for the jury (R. 299–301), explaining the presumption of innocence and reasonable doubt (R. 302–303), and outlining the charges against petitioner (R. 303–306), the court emphasized that knowledge and wilfulness were essential ingredients of the crime and defined these terms for the jury (R. 305–307).

At this point, the Court stated summarily the theory of the government's case. As the judge described it, Bankers would purchase a promissory note at the discount but, instead of paying the discounted price as agreed, the bank would end up paying the face value of the note because petitioner would issue a check in

the amount of the discount which he cashed for his own purposes (R. 308–310).

The court then described the defense position (R. 311–312). It observed that although petitioner did not "deny * * * any of these matters" (R. 311), he explained his actions on the ground that "he did not consider that he was doing anything wrong; that he thought these funds were due and owing to him" (R. 312).

At the close of the instructions, defense counsel objected "to the presentation of the Government's theory in its detail" (R. 316), stated that the court had not set forth fully to the jury the basic defense contention that petitioner had not intended to "defraud his company, nor * * * to embezzle the funds" and requested the court to define the word intent for the jury (R. 316; see also R. 314–315). The judge denied the request, pointing out that he had informed the jury as "clearly" as he could that they had to find intent in order to convict and that he had "defined the several terms that make it up" and did not believe he could "add to it" (R. 316–317).[1]

2. After the jury had deliberated some four hours, they were returned to the courtroom (R. 318).[2] The trial judge stated that he was "somewhat surprised"

[1] The court had previously charged the jury (R. 306–307):

"An act is done wilfully if done voluntarily and purposely, and with the specific intent to do that which the law forbids, that is to say, with an evil motive or a bad purpose, either to disobey or to disregard the law.

"An act is done knowingly when it is done with knowledge; and that is to be distinguished from an act done by mistake, inadvertence, or any other innocent reason.

"The term unlawfully simply means that the act was contrary to law. The term fraudulent, as I use it here, means that the action was characterized by trickery and deceit."

at their inability to reach a verdict, and that he "thought there was very little dispute in the evidence." He then asked the foreman whether "with a little further consideration," a verdict might be reached, and when the foreman advised that it was "possible," the court sent the jury out for further deliberation (R. 318, 319). About three hours later, the jury was brought back to the courtroom (*ibid.*). The foreman told the court that the jury was "in the process of taking another vote" and that he thought they "should be able to arrive at a verdict" (R. 320). The court thereupon directed that a vote be taken and, if unsuccessful, that the jury be excused over the weekend (R. 321-322). The following Monday morning, after having renewed their deliberations, the jury returned to the courtroom and requested that the testimony of petitioner and Mr. Burns be read over (R. 322). After this was done (R. 323*), the judge said that, while he did not ask a juror to "surrender his conscientious and his sincere convictions," he wanted each one again to make "a serious effort to arrive at a unanimous verdict," and that since the case "presents very little conflict in the evidence," he was very reluctant to declare a mistrial (R. 324). He stated further that, if the jury could not reach a verdict by that night he would discharge them (*ibid.*). Some two hours later the jury returned with a verdict of guilty (R. 325).

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* This occurred late Thursday afternoon. The court stated that matters scheduled before it on the following day in another city made a recess until Monday necessary (R. 321).

ARGUMENT

1. The judgment of the court of appeals was entered on December 7, 1961, and a petition for rehearing was denied on February 8, 1962. On March 2, 1962, Mr. Justice Black extended the time within which to file a petition for a writ of certiorari to and including March 30, 1962. Although the petition for a writ of certiorari was received by the Court on March 30, the record was not received until April 4. The petition was therefore untimely, since "it and the certified record" were not filed within the time for filing, as required by Rule 22(2) of the Rules of this Court.

2. In any event, the decision below is correct.

a. Petitioner asserts that, contrary to Rule 24(a) of the Federal Rules of Criminal Procedure (*supra*, p. 2), the Southern District of Texas has adopted a uniform procedure "of arbitrarily denying the individual trial judge the right to exercise his discretion" to permit defense counsel to interrogate prospective jurors (Pet. 6). Petitioner contends further that the trial court was acting pursuant to this procedure and in violation of Rule 24(a) when it denied his request for permission personally to question the jurors, with the comment, "We, as you know, follow the contrary practice" (R. 32).

Petitioner's first contention is answered by the fact, pointed out by the court below, that Rule 24 has been "adopted by the United States District Court for the Southern District of Texas in its Rule 32" (R. 360; 296 F. 2d at 217; Pet. App. 3). Beyond this, the court's statement is at most equivocal and, standing alone,

insufficient to establish that in this case the trial court failed to exercise its discretion in denying counsel's request to interrogate the jurors. Moreover, after having made careful inquiry into the qualifications and possible biases of the prospective jurors (R. 24–32), the court specifically asked most of the questions submitted by defense counsel (R. 16–18, 32–39).*

b. Petitioner contends that the trial court became "an advocate of the prosecution" (Pet. 7–8) in its original instructions to the jury and by expressing surprise at their difficulty in reaching a verdict. The record does not support the claim.

As we have described in detail in the Statement, *supra*, pp. 6–7, the trial judge gave the jury a fair summary of the case. He clarified an involved factual situation by pinpointing the essence of both the government and defense positions (R. 308–311). There was never any dispute that petitioner issued "discount" checks and then cashed them to his own account. The single question was whether his acts were done with criminal knowledge and intent. Moreover, the judge repeatedly admonished the jury that it was their recollection of the evidence, not his, which should control their decision (see *e.g.*, R. 302, 311).

The trial judge's comments to the jury when they

* Petitioner's reliance (Pet. 5–6), on *Spells* v. *United States*, 263 F. 2d 669 (C.A. 5), certiorari denied, 360 U.S. 920, is misplaced. That case did not involve any question of counsel's participation in the voir dire; rather the only issue was whether the trial judge had abused his discretion in refusing to ask the jurors a question submitted by counsel. Recognizing the broad authority of the trial court in these matters, the court of appeals held that he had not abused his discretion (263 F. 2d at 612–613).

indicated that they were having difficulty in reaching a verdict reveal his scrupulous concern that the jury reach a fair decision on the evidence (see Statement, *supra*, pp. 7–8). His observation that there was little dispute in the evidence was not, as petitioner infers, an attempt to have the jury return a guilty verdict; it was simply a valid characterization of the case. The trial judge exerted no pressure and indicated that the jury would be discharged if agreement could not be achieved. There was no impropriety in his actions.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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